

The Lady Vanishes

Dilip Simeon

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NB: I have not used footnotes in the text. Names and publications of cited authors are listed beneath the essay. DS

The sophists taught, rather publicly, the view that the summit of happiness is to combine the appearance of justice with actual injustice: Gregory McBrayer (2015), p 44

To speak of justice has always been to plunge into a metaphysical abyss, especially as the issue has been intractable since (at least) Plato's most famous work, *The Republic* was written some twenty-five centuries ago. Not least has been the permanently contentious issue – named the theological-political problem by Leo Strauss - of whether we should live according to divine or human guidance. But to speak of justice in India is confront our deeply divided souls; and in the most horrendous cases, to stare evil in the eye.

If Mrs Indira Gandhi dreamt of a 'committed bureaucracy,' our current rulers appear to be bent upon the complete domestication of civil society by their ideological enterprise. This requires a committed judiciary too, for which aspiration clues are ample, because they conspire in broad daylight. It was inevitable that some members of the judiciary were and continue to be complicit in this totalitarian project. We should be grateful that there are men and women of courage and conscience within. One of them was named Judge Loya.

Before proceeding further, here are the central issues:

1/ The line dividing legitimate from illegitimate violence has been eroded as part of a deliberate project. The fragile nature of this distinction was made evident in state-enabled massacres from 1946 till 1984 and 2002. This erosion has had profound consequences.

2/ Political assassination has been, and continues to be valorised in popular culture.

- 3/ Deaths that occur during communal riots or pogroms are also political assassinations. The brutality associated with war is no longer placed at the national frontier, but has been absorbed into society at large.
- 4/ Cultural and religious fault-lines from the past have been integrated into ideologies that transform civil society into a condition of permanent warfare. Law is sought to be converted into an instrument for the militarisation of civil society.
- 5/ The twentieth century saw many parts of the globe in the grip of 'movement' oriented seizures of power. This was not limited to anti-colonial movements. It included partisan efforts to capture the state and subjugate it to ideological control.
- 6/ Given the mixture of the above-mentioned circumstances, law loses its (always tenuous) connection with justice and truth and becomes allied to lies, deceit and propaganda. As the handmaiden of the unalloyed pursuit of power, it becomes the instrument of injustice.

The Argument: The implications of these features for a liberal concept of the rule of law will be the focus of this essay. Let me begin by summarising my argument. What we are witness to (and not just in India or South Asia) is the appearance of *ideologically saturated justice; accompanied by the supplanting of the rule of law by the rule of ideology*. This could be a gradual process, but it could also be hastened by revolutionary seizures of power, in which case it would also affect the jurisprudence of state legitimacy.

The theoretical manifestations of this perversion of justice by power were evident in the doctrines of the Nazi jurist Carl Schmitt. The counter to this was the insistence on dialogue as the basis for civic and international amity – symbolised most acutely by the life activity of Mahatma Gandhi. We have two versions of contemporary politics, the first based on animus, the second on friendship. I will expand on the meaning of this antinomy shortly.

The first appearance of ideological justice in the modern sense was the reign of terror under the Jacobins, which saw the trial and execution of the French monarchs in 1793. This not only led to the first total war - the Napoleonic wars - but grievously affected the

political atmosphere in post-revolutionary Europe. In India, the expansion of colonial power was based upon extreme violence, manifested as warfare, plunder, mutinies, famine and depopulation (Ranabir Samaddar 2006). It was also accompanied by legal tensions about sovereignty. In India this was dramatically expressed in the case (1829-1833) brought before the British monarch by the Mughal King Akbar Shah II, in the matter of the undermining of his status and privileges by the East India Company. Akbar Shah was represented by Raja Ram Mohun Roy, and the arguments and correspondence are dealt with in a learned essay by Professor Sabyasachi Bhattacharya (*The Colonial State*, 2016).

The debates about law and justice; domesticity and the public sphere; and differing traditional codes under colonial rule have been investigated by Radhika Singha (2000). Samaddar has analyzed the close connection between terror and constitution-making in nineteenth century colonial India, and its dependence upon intelligence gathering. It is ironic that contemporary protestations about the Anglicization of the Indian mind ignore the history of preventive detention without trial. This despotic legal practice was launched by Regulation VIII of 1818, extended by the Defence of India Regulations of 1915; and continued in one form or another by the post-colonial state. Today it is evident in the UAPA, under which mere accusation is enough to keep prisoners in jail for an indefinite duration.

Authority is a social force that relies neither upon violence nor reason for its potency; it requires generalized acceptance and unquestioning obedience. This presupposes ideological hegemony, which can be manifested only in a stable system of law and justice. The greater the reliance upon terror and intimidation, the more will justice appear arbitrary and partisan. These features are heralds of systemic implosion. (See for example, my article on 1984, Dilip Simeon, EPW, 2014). The colonial state could never fully establish convincing legitimacy; and the justice system in the successor states of British India has never been able to stabilize itself either. This is so despite the staggered introduction of electoral democracy during the first half of the twentieth century.

The advent of doctrine: Globally the status of law and the character of justice changed drastically during the nineteenth century. The most notable aspect of this

change was the increasing influence of political doctrine. The Great War of 1914-18 led to the collapse of four multi-national empires. This was followed by the reorganisation of states and movement-oriented seizures of power by the Bolsheviks in post-Tsarist Russia, and by ultra-nationalists in central and Eastern Europe. What was new about these times? In his book *The Treason of the Intellectuals*, the philosopher Julien Benda wrote:

With a hitherto unknown consciousness (prodigiously fanned by authors) every nation now hugs itself and sets itself up against all other nations as superior in language, art, literature, philosophy, civilization, “culture.” Patriotism today is the assertion of one form of mind against other forms of mind.... it may be said that to-day capitalism, antisemitism and the party of authority have all received new strength from their union with nationalism... Our age is indeed the age of the *intellectual organization of political hatreds*. It will be one of its chief claims to notice in the moral history of humanity... On the surface and in the depths, in spatial values and in inner strength, political passions have to-day reached a point of perfection never before known in history. The present age is essentially the age of politics (Julien Benda: pp 10-16).

These sentences were Benda’s way of describing the ideological conflicts which erupted between the two world wars. That was also the seeding time of the major problems in the Indian national movement, and heightening inter-communal conflict. Ideology is a complex phenomenon, and it is not simply a modern problem. An ancient precursor could be seen in sophistry, to which my head citation refers. Today the term is used interchangeably with political philosophy, and the stances of political parties. This usage is misleading, because the ideological erosion of state and juridical institutions lies at the heart of the problem I have been addressing. One way of stating the issue is by thinking about the following:

the gap between law and justice;
the gap between lawful and extra-legal violence
the theological-political problem

the question of civil religion (use of religion by the state)
the erosion of conscience by utility and partisanship
the fusion of party and state; the emergence of the state as faction
the abolition of institutional autonomy; of the separation of powers
the infusion of political life with absolute enmity
the politics of resentment, the collectivisation of revenge
the pursuit of power as an end in itself
the longing for homogeneity
the ideal of a totally administered society; of the technical control of history
the reduction of humans and nature to a 'resource' for 'glorious' projects
the political theatre of a Grand March of History; the 'rectification' of the past
the production of justifications for permanent warfare
the constant goading to confront so-called 'internal enemies'
the reduction of truth to a product of identity, location, etc
the use of mass media for mind control
the reduction of theory to interpretation
the experience of the present as a perpetual waiting room in transit to a Glorious Future.

All the above habits of thought are noticeable in the contemporary experience of justice.

Private armies and vigilante violence: In late 1947, amidst waves of violence shaking the newly-partitioned country, the AICC passed a resolution on private armies, dated November 16, 1947. It read as follows:

The All India Congress Committee has noted with regret that there is a growing desire on the part of some organizations to build up private armies. Any such development is dangerous for the safety of the State and for the growth of corporate life in the nation. The State alone should have its defence forces or police or home guards. The activities of the Muslim National Guards, the Rashtriya Swayamsevak Sangh and the Akali Volunteers and such other organizations represent an endeavour to bring into being private armies, (and) must be regarded as a menace to the hard-won freedom of the country. The AICC

therefore appeals to all these organisations to discontinue such activities and the Central and Provincial governments to take necessary steps in this behalf (Gandhi Heritage Portal, v 90, p 541)

But these exhortations were ineffective, as was the Viceroy's Boundary Force. A significant report compiled by the Communist Party of India on the situation in north-western India (Dhanwantri and P. C. Joshi, 1947) highlighted the collapse of state institutions, primarily the police and military. The opening paragraph read:

What happened in the Punjab cannot be called a riot. It was a regular war of extermination of the minorities, of the Sikhs and Hindus in Western Punjab and of Muslims in East Punjab. It cannot be compared to Calcutta or Noakhali, Bihar, or even to Rawalpindi for in all these cases it was mobs of one community that took leading part in killing, looting and burning the minority in the area, their communal passions being roused to a pitch of frenzy and savagery.. In the Punjab, however, in the recent biggest killing ever seen, it was the trained bands equipped with firearms and modern weapons that were the main killers, looters and rapers. These were the storm troops of various communal parties such as National Guards of the Muslim League in the Western Punjab, and the Shahidi Dal of the Akalis and the Rashtriya Swayamsevak Sangh of the Mahasabha in the Eastern Punjab. They were actively aided and often actually led by the police and the military in committing the worst atrocities... in violence and in brutality, in the numbers killed (which Syt Shri Prakasha, India's Ambassador to Pakistan places at 1 1/2 lakhs) in the use of plenty of modern deadly weapons, in the devastation spread over 14 districts of the Punjab and in the way in which the police, the military and the entire administration was geared not to stop the riots but to spread it – the Punjab tragedy is without parallel. (NB: Subsequent research has put the number of casualties at about 8 lakhs. DS)

The report makes visible the impact of communal ideology on the armed bodies of the state; and the gruesome consequences of the realisation that their officers were no longer neutral. The state disintegrated into the instrument of partisan communal factions. The situation had begun deteriorating in March 1947, with the resignation of

the Unionist-Congress-Akali coalition government; and the outbreak of mass rioting in Rawalpindi. As Governor Jenkins wrote to the viceroy in April 1947, *'We feel now that we are dealing with people who are out to destroy themselves and that in the absence of some reasonable agreement between them the average official will have to spend his life in a communal civil war. The Punjab is not in a constitutional situation but in a revolutionary situation.'*

The report describes numerous atrocities carried out by various partisan militias; as well as the extensive material support (including rifles, hand grenades, stenguns, mortars and jeeps) given to them by the princely states of Punjab, including Patiala, Jind, Nabha, Faridkot, Malerkotla, Bahawalpur and Kapurthala. It describes these states as 'the hotbeds... of cold deadly preparations for a war of extermination.'

Whereas the Congress 'became more and more tongue-tied as it moved nearer and nearer acceptance of division,' it reported the RSS as having taken over the towns, 'and roused the spirit of retaliation on the communal slogan of Akhand Hindustan by force.' The activity of armed militias during this period shows the extent to which communal fantasies acquired substance during the violence. Slogans of 'Hindu Rashtra', 'Akhand Hindustan' and 'Khalistan' were raised and Pakistan visualised as the new Madina. Utopian ideological abstractions materialised in a mountain of corpses. The beautiful Utopia of course, remained a dream.

The Dhanwantri Report mentions frantic efforts by Sikh leaders in western Punjab to get Akali leaders like Master Tara Singh to stop violence against Muslims in East Punjab. *'But the Akali leadership was following a policy not based on the interests of the Sikh people but which expressed the expansionist aims of the Sikh princes. The Akali leaders ignored the entreaties of their own people; and kept on giving the boastful slogan of re-establishing the empire of Ranjit Singh.'* They issued leaflets in the name of the Government of Khalistan, one of which declared: *'Khalistan is the Empire of Khalsa as left by Maharaja Ranjit Singh, the Sher-i-Punjab. Every Khalsa must pledge himself to this and nothing else.'*

Meanwhile the RSS was denouncing Gandhi and Nehru, and there was talk of Nehru meeting the fate of the Burmese left-nationalist leader Aung San, who had been

assassinated in July 1947. The RSS-Mahasabha press called for their own leaders to be appointed to the positions of Governor and Premier of East Punjab. These remarks merely skim over the surface of the disintegration of state and society in 1947. Suffice it to say that the period between the Calcutta Killing of 1946 and the genocidal mania of 1947 marked India's descent into nihilism, when speech was cast aside, and replaced by mass bloodletting. Significantly, it stopped (for the time being) only after January 30, 1948.

What could justice mean amidst such wide-ranging lawlessness? And have we not seen such moments recur in the successor states of the British Indian Empire ever since then? I contend that law and justice in these states has retained its nihilist core since then. This is manifest in repeated genocidal outbreaks accompanied by widespread examples of partisanship in various levels of criminal justice and amnesia of the judicial conscience.

The ideological legitimization of informal violence leads directly to the farming out of sovereign power to armed bodies allied to the 'movement.' This leads to imitative actions by other vigilante groups, and is a precursor to institutional implosion. During the 1920's and 1930's ideological movements in central Europe sought state legitimization; and were assisted by partisan elements within the judiciary and bureaucracy. Formalised intimidation only deferred the evil until a more blatant and brutal seizure of power could take place. In Japan, no comparable populist movement was visible, as a militarist and expansionist political culture was already in place throughout the period following the Meiji Restoration.

Under totalitarianism – or in a polity with developing totalitarian tendencies – the state cannot prevent permanent civil strife, no matter how powerful it is. The ruling strata may thrive on this strife and encourage it, but the explosions of violence and conflict will prove uncontainable. The experience of two great powers will suffice as examples: the disintegration of the USSR; and the unfolding gun violence (in defiance of law), coupled with insurrectionary trends with the USA. Sheldon Wolin's theory of the American polity as 'inverted totalitarianism' is relevant here (Sheldon Wolin, 2010).

The catastrophe of January 30, 1948: The starkest example of vigilante justice in independent India was the murder of Mahatma Gandhi. And if justice was thwarted in his case, the rest of us do not have much to complain about. The poisoned atmosphere in which the investigations between January 20 and January 30, 1948, were conducted; the laxity of the police; and the strange behaviour of Morarji Desai, then Home Minister of the Bombay government, are all noteworthy. Savarkar's lawyer asked Desai for more details on his client's involvement; upon which *Desai asked the defence lawyer for permission to give the full facts*. When the lawyer withdrew his question, Desai said nothing, and the court record was sanitised. (James W. Douglass, p 94).

The prosecution's failure to call Savarkar's employees, Appa Kasar and Gajanan Damle, who were in police custody throughout the trial and could have presented damning evidence, also indicates the government's complicity with the Savarkar defence. In his concluding remarks, Judge Atma Charan underlined '*the slackness of the police investigation of the case between January 20, 1948, and January 30, 1948*'; during which they had information the proper use of which could have saved Gandhi's life (Tushar Gandhi, p 138-139).

It is also noteworthy that the same judge allowed Godse to deliver a nine-hour long speech attacking the ideas of the man he had murdered. The courtroom became a platform for the ideological projection of Savarkar's doctrines of communal hatred. The polished rhetoric led to surmises that Savarkar had vetted it, if not written it entirely (Tushar Gandhi, p 607). The government banned the speech, which was released three decades later, and became a popular propaganda text of Hindutva propaganda. The brunt of the speech is the attack on *ahimsa* and the focus on revenge (James W. Douglass, p 92).

The Justice Jeevan Lal Kapur [Commission of Inquiry](#) was set up after Savarkar's death in 1966. It received its impulse from public outrage at the fact that the release of the remaining convicts was celebrated by the Hindu Mahasabha in Pune in 1962. Its report was published by the Union Home Ministry in 1970. It notes that,

All this shows that people whom were subsequently involved in the murder of Mahatma Gandhi were all congregating in Savarkar Sadan and sometimes had

long interviews with Savarkar. It is significant that Karkare and Madanlal Pahwa visited Savarkar before they left for Delhi, and Apte and Godse visited him both before the bomb was thrown and also before the murder was committed.... All these facts taken together were destructive of any theory other than the conspiracy to murder by Savarkar and his group. (Kapur Report, Part 2, volume 6, p 318; and p 303)

On October 17, 2014, the RSS mouthpiece in Kerala, *Kesari*, published an article which stated that 'Godse pulled the trigger on Gandhiji's chest after a respectful bow. It was unlike Nehru who stabbed Gandhiji from behind and greeted him from front.' Aside from the blatant conflation of a literal shooting with a metaphorical stabbing, the RSS is probably the first NGO to place before us the concept of a 'respectful' assassination. Be that as it may, here is the assessment of a historian who summed up the truth about the murder of a man who fought the British Empire for 32 years, and whom independent India did not permit to live 32 weeks:

In the eyes of too many officials, he was an old man who had outlived his usefulness: he had become expendable. By negligence, by indifference, by deliberate desire on the part of many faceless people, the assassination had been accomplished. It was a new kind of murder – the permissive assassination, and there may be many more in the future. (Robert Payne, p 647)

Between law and justice: the problem of legal indeterminacy: The enigma of legal indeterminacy has dogged legal theory for the entire century gone by. The central issues concern the meaning of the rule of law, and its prerequisites. These include the clarity and generality of legal norms, and their public, prospective and stable character. These norms reduce the misuse of state discretion, and safeguard individual freedom and the democratic rights of civil society groups such as trades unions, NGO's, private enterprises, publications, etc. When laws are vague, or if secrecy and retroactive provisions come into the picture, we move away from a liberal-democratic judicial system towards authoritarianism. Among the better-known scholars of these matters are Hans Kelsen, Otto Kirchheimer, Judith Sklar, Richard Posner, and Joseph Raz.

The twentieth century became the age of what the conservative German jurist Carl Schmitt theorized as 'political theology'. His ideas have stirred up much controversy; in particular because of his appeal to both left and right-wing critics of liberalism, and his vacillation between normative and descriptive formulations in his writing style. His two most well-known formulations are about decision: '*Sovereign is he who decides on the exception*' the first line in *Political Theology* (1922); and '*The specific political distinction to which political actions and motives can be reduced is that between friend and enemy*' (Carl Schmitt, 1932, p 26). It goes without saying that the sovereign is the one who correctly discerns the enemy. Whether the decision is wise or unwise, and what the criteria might be for making it, are matters Schmitt subordinated to the theological sources of monarchical power, and to the political atmosphere of his time.

Carl Schmitt founded the politics of metaphysical enmity; the theorist for whom animus was raised to an axiom of political philosophy. Beginning from a principle of fundamental human belligerence and the accompanying need for a dictatorial state Schmitt cited examples from classical Rome leading up to the Bolshevik 'dictatorship of the proletariat' to argue for a system embodying a permanent emergency. The terms *decisionism* and *political theology* were used by him in a famous work titled *Political Theology*. He wrote,

The classical representative of the decisionist type... is Thomas Hobbes. The peculiar nature of this type explains why it, and not the other type, discovered the classic formulation of the antithesis: *auctoritas, non veritas facit legem*' ('authority, not truth, makes law.' (Carl Schmitt, 1922; p 33)

But whereas Hobbes wanted a strong state to control human belligerence, Schmitt admired 'animal power,' and advocated political enmity and decisionism. And whereas for Max Weber the essence of the state was the monopoly of force; for Schmitt, it was the monopoly of decision (Jens Meierhenrich, 2016, p. 31).

In 1923, Schmitt claimed that 'acclamation' was superior to voting procedures, and that Italian fascism and Russian Bolshevism 'were certainly anti-liberal but not necessarily antidemocratic.' (Carl Schmitt, 1923, 16). The machinations whereby the Bolsheviks

seized power in October 1917 without the prior authorisation of the Congress of Soviets in whose name they acted, gave rise to intense debate about the nature of that event. But there is no doubt that it could not have taken place without Lenin's leadership. Lenin was the first successful decisionist politician of the twentieth century. Marxist-Leninists remain unperturbed by the paradox that a political theory founded upon the dogma of historical necessity was shown to have depended for its success upon contingency and individual will. (Lenin's ideology of law and politics is discussed in Dilip Simeon, EPW, 2017).

Schmitt often cited the concept of proletarian dictatorship popularised by Lenin, as the basis for his claim that dictatorship was not antithetical to democracy. (Jens Meierhenrich, p 475). Ironically, this claim was contested by Lenin's close comrades in an extraordinary debate in November 1917 about press freedom and the need for a socialist coalition. The minutes of the Fifth Session of the Central Executive Committee of the All-Russian Congress of Soviets include the Left Socialist Revolutionary's (Left SR) statement that:

The struggle for press freedom has always been closely bound up with the struggle for socialism... The resolution on the press... is a clear and unambiguous expression of... a system of political terror and for unleashing civil war. The SR fraction... has no desire to bear any responsibility for this system of terror, ruinous for the revolution, and therefore withdraws all its representatives from the Military Revolutionary Committee, the staff, and all responsible posts...

Eleven Bolshevik members of Sovnarkom sided with the Left SRs (who were partners of the Bolsheviks in the seizure of power on October 25). They denounced Lenin's refusal to form a socialist coalition. Four of them resigned their posts. Viktor Nogin, Commissar for Trade and Industry read out their 'urgent' statement:

It is vital to form a socialist government from all parties represented in the soviets. Only such a government can seal the heroic struggle of the working class and revolutionary army... We consider that *a purely Bolshevik government has no choice but to maintain itself by political terror*... We cannot follow this course

which will lead to the proletarian mass organizations becoming estranged from those who direct our political affairs, to the establishment of an irresponsible government and to the annihilation of the revolution and the country. We cannot bear responsibility for such a policy, and therefore... resign from our posts... (emphasis added): J. L. H. Keep, (ed) *Debate on Soviet Power*; pp 77-78.

In 1919, Lenin explicitly justified dictatorship and terror:

When we are reproached with having established a dictatorship of one party and, as you have heard, a united socialist front is proposed, we say, "Yes, it is a dictatorship of one party! This is what we stand for and we shall not shift from that position because it is the party that has won, in the course of decades, the position of vanguard of the entire factory and industrial proletariat. This party had won that position even before the revolution of 1905. (Lenin, *CW*, Vol 29, p. 535)

Two years later, in 1922, he instructed the commissar for Justice, D.I. Kursky:

The courts must not ban terror - to promise that would be deception or self-deception - but must formulate the motives underlying it, legalise it as a principle, plainly, without any make-believe or embellishment. It must be formulated in the broadest possible manner, for only revolutionary law and revolutionary conscience can more or less widely determine the limits within which it should be applied' (Lenin, *CW*; Vol 33, p 358)

What was 'revolutionary conscience', and what was the guarantee that it was properly applied by those claiming to possess it? Such questions lead inexorably to the claim, a favourite among Bolsheviks, that 'the Party is always right.' This is another way of saying 'Sovereign is he who decides on the exception.'

The clubbing together of Lenin and Mussolini by Schmitt ought to make us think. The fact that he should have deemed their actions to be democratic though not liberal, is equally revealing, for it tells us a great deal about the confusion and misuse of the term liberal in our times. In Russia however, some of his communist contemporaries had intense misgivings about the conflation of democracy and dictatorship.

Meanwhile in Germany, Hitler's attempted putsch in 1923 saw the advent of ideological warfare within the state machinery. This was aptly demonstrated in Hitler's release in 1924 (he was still an Austrian citizen) after serving only ten months of a five-year sentence. The release was ordered by the governor of Landberg prison against the strong opposition of the Munich police and state prosecutor. The years that followed saw repeated instances of impunity granted to Nazi activists; combined with an animus toward communists and social democrats. It was this bias that prompted Neumann to observe that the judiciary stood *in the centre of the counter revolution* (Franz Neumann; 1944, p 27).

Here are some telling observations made in 1944:

(The counter revolution) ...tried many forms and devices, but soon learned that it could come to power only with the help of the state machine and never against it... the Kapp Putsch of 1920 and the Hitler Putsch of 1923 had proved this... In the centre of the counter revolution stood the judiciary. Unlike administrative acts, which rest on considerations of convenience and expediency, judicial decisions rest on law, that is on right and wrong, and they always enjoy the limelight of publicity. Law is perhaps the most pernicious of all weapons in political struggles, precisely because of the halo that surrounds the concepts of right and justice... 'Right', Hocking has said, 'is psychologically a claim whose infringement is met with a resentment deeper than the injury would satisfy, a resentment that may amount to passion for which men will risk life and property as they would never do for an expediency'. When it becomes 'political', justice breeds hatred and despair among those it singles out for attack. Those whom it favours, on the other hand, develop a profound contempt for the very value of justice, they know that it can be purchased by the powerful. As a device for strengthening one political group at the expense of others, for eliminating enemies and assisting political allies, law then threatens the fundamental convictions upon which the tradition of our civilization rests... (Franz Neumann, 1944, p 27)

Sovereign dictatorship as the solution to legal indeterminacy: Within a few years the German state moved from being one governed by legal norms to being one run by the assumed prerogatives of a pathological tyrant. The manoeuvres that preceded these developments involved Article 48 (2) of the Weimar Constitution, which allowed the President to suspend basic rights, including freedom of the person, the sanctity of the home, the freedom of speech, privacy of communication, and the freedom of association. These powers came to be known as the dictatorship of the *Reichspresident*, and for Schmitt, signified a monarchical-type of authority that was prior to and transcended the authority of the Constitution.

During the 1920's Schmitt had expressed his contempt for the Weimar Constitution as a statute which ignored the essence of politics (the friend-enemy distinction); and was a belated attempt to transplant the liberal ideals of 1848 into the twentieth century. He believed liberal democratic institutions were incapable of making that distinction, because of their formalistic 'value-neutrality.' Even the secret ballot was in his eyes, an objectionable expression of 'liberal individualism.' (Jens Meierhenrich, 2016, Chapter 18). But he saw Article 48 as the core of dictatorial power. In his book *Legality and Legitimacy*,

He suggested that the second, liberal part of the Weimar Constitution be "cleansed" and used as a constitutional foundation for a dictatorship that breaks radically with the liberal democratic components of its first section. In short, by relying on selected features of the Weimar Constitution, the executive should undertake a constitutional counterrevolution culminating in an authoritarian alternative to the weak "quantitative total state" '. (William Scheuerman, 2020, p 116).

In Schmitt's view, a sovereign dictator was distinct from a commissarial dictator, who derived his authority from a pre-existing statute. The decisions of a sovereign dictator emanated *ex nihilo*, out of nothingness. There was no pre-existent standard of normalcy against which the exception was to be determined; but rather *it was the sovereign dictator who decided and defined the standard of normality*.

In mid-1932, the conservative government of Franz von Papen removed the ban on the Nazi stormtroopers (SA) while retaining it for the Communist Red Front. The resulting street battles were then used by him to get President Hindenburg to act under Article 48 and remove the Social Democratic (provincial) government of Prussia from power. This government was the last institutional bastion of resistance to Nazism, and the decision of the Federal Court to uphold it was a milestone in the sabotage of the Weimar Constitution. It also paved the way for the Enabling Act of 1933 which gave Hitler, as Chancellor, untrammelled powers to enact laws without parliamentary consent, and even to alter provisions of the Constitution.

Thus was the Weimar Republic demolished from within (Jens Meierhenrich, p 500).

Carl Schmitt joined the Nazi party in 1933, and soon became known for the ambivalent concept of the “total state”, a phrase that became popular with Hitler. Contemptuous of the principle of state neutrality, he attacked the liberal total state (*total* here referred to the widespread demands in the 1930’s for social-democratic state intervention). He argued for its replacement by a kind of totality which would abolish the indecision and hypocrisy of parliamentary democracy. His solution to legal indeterminacy was to redefine and relocate determinacy in a racially and ethnically homogeneous “folk community”: this to be accompanied by homogeneity within the judiciary (William Scheuerman, 2020, p 135).

Schmitt soon came to be known as the Nazi’s ‘crown jurist’. Since his ideas were a departure from the classical conservative animosity toward popular democracy, he clarified them by separating capitalism from liberal democracy:

His response is especially revealing given the light it sheds on Schmitt’s views about plebiscitarianism and modern democracy and capitalism and state regulation. Here, political liberalism is systematically discarded, whereas some core features of economic liberalism are maintained. Capitalism and liberal democracy are separated: Schmitt’s economic model *empowers* capital by freeing it from the regulatory burdens of the democratic welfare state, while his plebiscitarianism drastically *curtails* genuine popular participation. What Schmitt provides here is nothing less than a political theory of authoritarian

capitalism but one in which authoritarian political institutions are masked by an appearance of popular legitimacy. (William Scheuerman, 2020, p 113)

In a word, this gesture marked the deathly embrace of democracy by its traditional opponents. The 1930's were marked by disfranchisement of Jews, Gypsies and Poles; and the elevation of Hitler to the status of ultimate law giver. As the Nazi's top legal advisor Hans Frank, infamous for his genocidal activities in Poland, declared in 1938:

Whether the Fuhrer does or does not govern according to a formal written constitution is not a fundamental legal issue. Only the question of whether the Fuhrer through his activity safeguards the life of the Nation is the fundamental legal issue of our time. (J. P. Stern, p 109)

On June 30, 1934, Ernst Rohm, head of the notorious 'brownshirt' stormtroopers along some 200 SA men, generals, civil servants, and other 'inconvenient' persons were murdered on Hitler's orders: an event which is known as the Night of the Long Knives. On July 3, a law was passed exempting from prosecution all such acts between June 30 and July 2 (J. P. Stern, p 146). Soon after, Schmitt published an influential article arguing that Hitler's act 'was itself the highest justice' (Mark Lilla, p 51). His justifications of retro-active law were accompanied by intense antisemitism to the point of demanding the 'racial' homogeneity of the judiciary, and the 'racial' cleansing of libraries.

In sum, Carl Schmitt's theories were a sophisticated attempt to pervert existing statutes to re-establish monarchical-style absolute power under a legal garb. It was a pious fraud

More can be said about this, but the point I wish to stress is that legal indeterminacy is not just a jurisprudential issue but an ideological one; and this is true intrinsically as well as in the historical sense. Intrinsically because of the problem of bad faith: can the promise of justice in any system be more than a tenuous aspiration? Are those making the promise unaware of the indeterminacy? Historical because the practice of law in the past century has raised very complex questions. And philosophical because the problem of justice is as old as the history of reflective thought.

Totalitarianism, ideology and law: In a study of the origin of the idea of justice, Walter Kaufman points to a single source: a social instinct propelled by the sense of an unfulfilled promise; and the need to redeem that promise. What is crucial to this aspect is the relationship between the affected parties: if the person violating the promise has legitimate authority, the sense of injustice will be stronger (Walter Kaufman, p 214).

This resonates with Kautilya's observations on the causes of dis-content in a polity (L. N. Rangarajan, 1992, p. 159). Impoverishment, greed, and disaffection, he says, are engendered when the king:

- 1/ ignores the good [people] and favours the wicked;
- 2/ causes harm by new unrighteous practices;
- 3/ neglects the observation of the proper and righteous practices;
- 4/ suppresses dharma and propagates adharma;
- 5/ does what ought not to be done and fails to do what ought to be done;
- 6/ fails to give what ought to be given and exacts what he cannot rightly take;
- 7/ does not punish those who ought to be punished but punishes those who do not deserve to be;
- 8/ arrests those who should not be arrested but fails to arrest those who should be seized;
- 9/ indulges in wasteful expenditure and destroys profitable undertakings;
- 10/ fails to protect the people from thieves and robs them himself;
- 11/ does not do what he ought to do and reviles the work done by others;
- 12/ causes harm to the leaders of the people and insults those worthy of honour;
- 13/ antagonizes the [wise] elders by lying and mischief;
- 14/ does not recompense service done to him;
- 15/ does not carry out his part of what had been agreed upon; and
- 16/ by his indolence and negligence destroys the welfare of his people.

It is clear from the above that whether it be a king or any sovereign howsoever appointed, an experience of injustice is accompanied by the sense of *unfairness*, which enters the perception of a violated promise. When Prime Minister Modi tells us that too great an insistence on rights and too little emphasis on duties has weakened India; he

should keep in mind that these norms apply especially to those in authority. If the misuse of authority, the violation of promises, and unfair practices in government were visible twenty-five centuries ago, they do not require divine wisdom to be noticed by the public today.

Legal indeterminacy has been compounded by ideology, and the ongoing attempt to replace the rule of law by the rule of ideology. Even when law under a factional regime has been permeated by ideology, if in specific circumstances the laws conflict with the requirements of the regime, they will be cast aside and power will take precedence.

We will have arrived at the polity known as an ideocracy, the tyranny of an ideology.

We need only recall the fate of 2010 Nobel Peace Prize winner Liu Xiaobo, scholar and journalist, whose only crime was to take seriously Article 35 of the Constitution of the PRC, which guarantees China's citizens "freedom of speech, of the press, of assembly, of association, of procession and of demonstration." Having spent 5 years in jail during the 1990's, he and other Chinese intellectuals drafted Charter 2008, calling for democratic reforms. He had also investigated and exposed the involvement of senior state and communist authorities in rampant corruption. In late 2009, a Beijing court sentenced him to 11 more years for undermining state authority. All that he asked was for the Chinese constitution to be honoured by the Chinese state.

On July 13, 2017, Liu Xiaobo died of liver cancer after nearly a decade of imprisonment. His wife was placed under illegal house arrest for months before being allowed to leave the country. It is an indication of the brittle nature of totalitarianism that it so fears the power of the human mind that it can sentence dissidents to a living hell rather than allow them to speak freely. Communists the world over should reflect on how much their campaigns for democratic rights are compromised by association with such brutal dictatorships.

A historian of the second world war has observed: *'The inclination to demand compliance with one's ideas is a more extreme and aggressive trait than the brutal*

demand to somebody to relinquish some of his possessions' (John Lukacs, p 165).

Neumann made the insightful remark that *'propaganda is violence committed against the soul. Propaganda is not a substitute for violence, but one of its aspects.'* (Franz Neumann, 1944, p 356). Otherwise stated, *'there is an immense difference between a society in which traditional criteria of good and evil remain valid, no matter how often they have been violated, and one in which these criteria have been abrogated and have fallen into oblivion.'* (Leszek Kolakowski, 1990, p 47).

It is important here to underline the relevance of the institutional autonomy characteristic of the liberal democratic state. This autonomy was completely contradictory to fascist corporatism; Schmitt's total state; and the Marxist-Leninist dictatorship of the proletariat, which crystallized as the tyranny of the Party claiming to represent the proletariat. Institutional autonomy is rejected by all these forms of totalitarian politics. Contrary to this is the value placed on the separation of powers: *'Liberalism is a world of walls, and each one creates a new liberty'* (Michael Walzer, 1984, p. 326 - 327).

Institutional autonomy is necessary to individual and group liberty; as well as to maintain and uphold *the integrity of the state*. It is a response to the complex nature of modern life; and protects the state not only from foreign conquest, but *'against domestic seizure.'*

It follows that temporally situated victories do not authorize any political faction (and parties are factions, no matter that they claim to represent the entire population) to seize control of the state for eternity. Totalitarian movements do indeed make such fantastical claims, and seek to abolish the authority of all institutions which can protect the state from factional seizure. Ideological warfare is always very close to the practice of political violence. It has nothing to do with the socialism vs capitalism debate, because market fundamentalism is also an ideology committed to total power over the state.

Another word for such a society is tyranny. Tyranny is bad enough when manifested in the actions of a personal dictatorship. It becomes ominous when it assumes an

ideological form, as in the USSR, Fascist Italy, Germany's Third Reich, the Peoples Republic of China, or the Islamic regimes of Iran or Saudi Arabia (I remain focused on the question of law, and do not intend to conflate the peculiarities of these regimes). Tyranny stamps out human freedom. Ideological tyranny attempts to strangle the human mind altogether. Human beings are the speaking animal, and the suppression of thought is an attack upon a quintessentially human quality. For this reason, ideocracies are the grave of life.

Conclusion: Our examination of modern justice points toward Machiavelli's substitution of patriotism for moral virtue, a stance that abandoned older meanings of the good society; and discounted any divine or natural support for justice. For Machiavelli, legitimacy was rooted in illegitimacy, and all social orders were established by questionable means. Justice was possible only after the foundation, and its violent origins would inevitably be imitated in extreme cases. The Machiavellian-Hobbesian tradition, continued by Schmitt, takes its bearings by the extreme case, which it believes to be more 'realistic' than the normal case. This approach is characterized in political science as the "teleological suspension of the ethical" - another way of saying that civic peace can only be achieved by bloodletting. It is an assumption which has been replicated in revolutionary currents from the French revolution till the insurrectionary politics – whether of the Left or Right - of the twentieth century. The revolutionary tradition views the polity as a state of permanent emergency.

Gandhi believed that a good society could never arise from evil foundations. His view is therefore the opposite of Machiavellian pessimism. Contrary to the belief that violence is essential to the act of political foundation, Gandhi made the prescient observation that '*what is granted under fear can be retained only so long as the fear lasts*' (M. K. Gandhi, 1909, p 60). A polity founded upon assassination, which makes the extreme case into a norm, would condemn itself to perpetual oscillation between extremes.

The modern tendency to reduce truth to the preserve of the mathematical sciences meshes well with the capitalist obsession with accumulation and the dissipation of the Good into utility. These tendencies push us toward replacing the soul by the intellect,

and the mind by neurobiology. (We may note in passing the difference between psychiatry, which treats of the brain, and psychoanalysis, which engages the mind). The question of the soul is important because the conventionalist, or relativist understanding of justice; as well as the doctrine that grounds justice in fear, both treat justice as an importation from the outside. These doctrines prevailed for centuries, and remain current. In contrast, for Aristotle, friendship was a necessary condition for human existence, and the fundamental bond of a political community, whose continued existence could never be secured by mere compact (Lorraine Smith Pangle; 2003, p 17).

If justice is sought to be grounded in fear, and the bond of the community defined as hatred for the 'common enemy' as in Schmitt's approach; fear and enmity will consume society and pervert the very experience of friendship. For Plato, we cannot even speak of justice without a friendly comportment toward the Good, awareness of which unifies life and the larger cosmos which is its home. He sought therefore to ground justice in human nature, as a habit of mind, an inward grace, and an excellence of the soul (Ernest Barker; 1979; p 182-186; and Christine Korsgaard; 1996; p 109). This idea of justice resonates with Gandhi's demeanour towards it.

In light of the continuing practice of political assassination in South Asia, I would use Gandhi's insight to make the following observation: the supposedly necessary violence of the origin has never been fully discharged, nor will it ever be. The elusive "stability" of the socio-political order will remain grounded upon periodic repetitions of originary violence for as long as the autonomy of the criminal justice system is not firmly and formally established; and as long as the state machinery remains vulnerable to ideological intimidation. This is what I mean by the nihilist core of Indian justice.

In rejecting revolutionary political theory (which is also a constitutional theory; and a theory of the state) from the Jacobins to the Bolsheviks, Fascists and Nazis, Gandhi was challenging a centuries-old tradition. His rejection of the utilitarian aphorism about the end justifying the means points us toward the deeper ramifications of 1947; and throws light upon extremist politics in the successor regimes of colonial India. The challenge becomes even more grievous when viewed in the light of the ideological atmosphere of

the first half of the twentieth century, when the question of truth was completely subordinated to the quest for absolute power.

I have focused on law and justice through the prism of two individual lives for a reason. The link between them becomes visible in the manner of Gandhi's death, which placed the tragedy and heroism of blighted humanity into high relief. Mohandas Gandhi naturalised friendship; Carl Schmitt elevated animosity to a first principle of life and thought. Gandhi's stance exemplified Aristotle's belief that friendship makes justice unnecessary. As he wrote in 1909, *'the force of love is the same as the force of the soul or truth. We have evidence of its working at every step.'* For him, history is the story of rupture, not of human solidarity - if there were no love, we would have become extinct long ago (M.K. Gandhi, 1909, p 67).

There is something about formal law, moral law, the workings of conscience, and the advent of the ideological age, which connects the life and death of Mahatma Gandhi with our predicament. Conscience is the impulse toward the Good. Ideology is the thought process whereby conscience implodes and undermines itself. It feeds on hatred; it replaces speech by sneering. Carl Schmitt's concept and prescription of politics as the friend-enemy relation has been the hallmark of twentieth century politics, not only for South Asia, but for the world at large.

January 30, 1948, marked the catastrophic victory of this nihilist outlook.

But has it succeeded? Are not its self-destructive ramifications visible in every corner of the globe? Is not humanity staggering about the continents like Ashwatthama, the tragic figure of the Mahabharata, deprived of mindfulness as well as the relief of death? Those who preen themselves on ruthlessness and cunning will come to learn that the destruction of justice is the prelude to social and political disintegration. Unfortunately, millions of ordinary people will pay a heavy price for this learning process.

Epilogue: Here are the last lines of a renowned play, set in the last day of the Mahabharata:

'That day the world descended into the age of darkness which has no end, and repeats itself over and over again. Every moment the Lord dies somewhere or the other every moment the darkness grows deeper and deeper. The age of darkness has seeped into our very souls. There is darkness, and there is Ashwatthama, and there is Sanjaya and there are the two old guards with the mentality of slaves and there is blind doubt, and a shameful sense of defeat... And yet it is also true that like a small seed buried somewhere in the mind of man there is courage and a longing for freedom and the imagination to create something new. That seed is buried without exception in each of us and it grows from day to day in our lives as duty as an honor as freedom as virtuous conduct. It is this small seed that makes us fear half-truths and great wars and always saves the future of mankind from blind doubt slavery and defeat.' (Dharamvir Bharati, *Andha Yug*, 1953, Translated by Alok Bhalla 2005)

Kuryad vidvams tatha saktas cikirsur lokasamgraham (Bhagwadgita III 25)

The disinterestedly wise ought to desire the holding together of all being

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